Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

John J. Bibby,
Petitioner,

V.

Philadelphia Coca Cola Bottling Company,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In upholding the District Court's ruling, granting summary judgment for respondent, did the Court of Appeals for the Third Circuit err by allowing the District Court to create a heightened burden of production, requiring petitioner, a gay male and an otherwise worthy Plaintiff suing under Title VII, suffering from same sex harassment that materially altered his work place thereby creating a hostile work environment, to first prove that the egregious behavior complained of, was not predicated upon his sexual orientation?

Did the Third Circuit err, thereby creating a split among the districts, over the method of analysis acceptable for what quantum of evidence suffices to present a prima facie Title VII case based upon gender stereotyping?

Did the Third Circuit err in concluding that the petitioner's complaints, stemming from same sex harassment, were based on petitioner's sexual orientation, and not gender stereotyping, simply because the majority of the behavior complained of did not have a sexual component to it?

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PETITION FOR WRIT OF CERTIORARI

John J. Bibby, ("Petitioner") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 1, 2001, in order to resolve the important issues presented herein.

◆

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Third Circuit that gives rise to this petition is reprinted in Appendix A hereto ("App. A") at page A-1. The opinion and order of the United States District Court for the Eastern District of Pennsylvania is reproduced in Appendix B hereto, ("App. B") at page A-9.

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JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was issued on August 1, 2001. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the denial of the United States Court of Appeals for the Third Circuit.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

◆

STATUTES INVOLVED IN THIS CASE

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (as amended)
42 U.S.C. §2000e-2
"Unlawful Employment Practices"

(a) Employer Practices
It shall be unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

to limit, segregate , or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Petitioner, John J. Bibby, is, and has been an employee of Philadelphia Coca-Cola Bottling Company, respondent since 1978. In 1990, Petitioner came to the attention of management with his intervention at the plant in an effort eliminate a dangerous condition which he had

photographed to present at a safety hearing. He was suspended for taking photographs. Up until that point, he had a spotless employment record.

In 1993, Human Resources became aware that Petitioner was a person whose sexual orientation was homosexuality. Human resources became aware when Petitioner had become seriously ill at the plant. Co-workers learned of Petitioners sexuality and feared that he was sick at work due to the A.I.D.S. virus. After being rushed to the hospital for heart attack trauma symptoms Petitioner learned that he had been terminated by respondent as he was alleged to be malingering. Petitioner's termination was reversed and he was reinstated with back pay and benefits after a full trial before an arbitration panel within four months of his termination.

From 1994 onward, Petitioner had to endure ever increasing attacks on his personhood. Throughout 1995, supervisors would attack his abilities and issue "write-ups" indicating Petitioner's alleged failures as an employee. He was denied rightfully owed promotions by supervisors. He was attacked by co-workers as effeminate with yells of "faggot" and "sissy". Petitioner suffered a nervous breakdown due to the constant irrational disciplinary actions and hostile work environment where his "manliness" was challenged daily. Some of the attacks on Petitioner were combined with threats of immediate violence to him. Ugly incidents occurred frequently wherein Petitioner

was taunted with hateful statements: "everybody knows you're as gay as a three dollar bill"; "everybody knows that you take it up the ass" and "everybody knows you're a faggot". Sexually explicit Men's Room graffiti - portraying Petitioner in a stereotypic degrading female role - was not removed with the timely removal of all other graffiti. Petitioner made complaints to no avail.

In 1996, respondent allowed the harassment and abuse against Petitioner to grow unchecked. A policy of enforcement of any and every technical violation of company policy was reported against Petitioner but not his co-workers. However, if Petitioner reported safety, personal or other co-worker violations, no action was taken. In fact, his grievances were directed to the vice-president of operations. This person would frequently berate and verbally abuse Petitioner; and he was responsible for terminating Petitioner while Petitioner was rushed to the hospital in 1993. Co-workers who did not support the abuse of Petitioner were too frightened of retaliation to come forward and complain.

On January 20, 1998, Petitioner filed a *pro se* complaint in the Federal Court for the Eastern District of Pennsylvania against his employer alleging discrimination. A more specific complaint was filed as an amended complaint once counsel was retained by Petitioner. The amended complaint, filed on June 30, 1998, claimed Petitioner was the target of same sex harassment in violation of

Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. §2000e et seq.

Respondent filed a Motion for Summary Judgment claiming that Petitioner was only attacked, if at all, because he was/is gay and has no Title VII protection. Respondent then filed four supplemental arguments to the original submission of their motion for summary judgment. Petitioner responded to each of respondent's supplements to the motion for summary judgment. The District Court granted respondent's motion for summary judgment on March 2, 2000. The District Court's decision rested on the finding by that Court that Petitioner was suffering from discrimination that was based on his sexual orientation and was, therefore, not recognized as justiciable under Title VII.

Petitioner appealed the decision to the Federal Court of Appeals for the Third Circuit claiming that an otherwise worthy plaintiff suing under Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. §2000e et seq., who has suffered from same sex harassment, which materially altered his work place and created a hostile work environment, was required to meet a threshold burden of production – not required of heterosexual litigants – to prove that the egregious behavior was not predicated upon his sexual orientation. Cases involving harassment between heterosexuals were judged on the nature of the behavior being complained, and not upon the litigant. Petitioner was unable to find an

instance where a heterosexual Title VII plaintiff alleging sexual harassment and hostile work environment, had to prove, as a threshold matter to the trial court, that the alleged behavior was not based upon plaintiff's heterosexuality which is a sexual orientation.

The Federal Court of Appeals for the Third Circuit affirmed the District Court decision on August 1, 2001. The Third Circuit held that Petitioner presented insufficient evidence to prove Petitioner's suffering was caused by discrimination "because of sex".

REASONS FOR GRANTING THE WRIT

I. The Question Presented Is Important

A hostile work environment wherein the targeted employee is regularly verbally assaulted and attacked as "less than a man" is prohibited by Title VII as improper and "gender stereotyping". Gender stereotyping was defined and held actionable in Price Waterhouse v. Hopkins , 490 U.S. 228 (1989) which held that discrimination based upon perceived gender inadequacies was nothing less than an attack based upon gender. Some Circuit Courts have been bold in embracing the concept of Title VII discrimination through the impermissible use, and prosecution of, gender stereotyping. The First Circuit Court of Appeals in Higgins v. New Balance Athletic Shoe, Inc. , 194 F.3d 252, 261 n.4 (1st Cir. 1999) and the Ninth Circuit Court

of Appeals in Schwenck v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) and Nichols v. Aztecka Restaurant Enterprises , No. 99-35579, _____ WL _____ (9th Cir. 2001) have embraced the notion that gender stereotyping – as to either gender – has no objective basis and violates the prohibitions of Price Waterhouse and Oncale.

Gender or sexual stereotyping occurs when an employer evaluates an employee by insisting that the employee conform to the employer's notion of appropriate sexuality and the employee's failure to match the stereotypic view of that sex. In Petitioner's matter, the Third Circuit Court of Appeals indicated a general support for the prohibition against gender stereotyping, but dismissed protection for Petitioner claiming that no issue of by gender stereotyping was raised by the complaint.

Respondent acted against Petitioner through harassment and negative tangible job actions affecting his promotion status, vacation and his salary. The existence of a predicate exclusionary factor, such as sexual orientation, is very seductive in its ability to end litigation and may act to inhibit dialogue on serious workplace issues like gender stereotyping. The Third Circuit did not apply a gender stereotype "construct" to analyze Petitioner's allegations. The Third Circuit found that the possibility that gender stereotyping had been employed by respondent was too remote since it had never been expressly alleged by Petitioner. The Court made no attempt to analyze respondent's

behavior or Petitioner's behavior as anything other than grievances and alleged harassment focused solely against Petitioner on the basis of sexual orientation. Petitioner pled with specificity that he was treated poorly by respondent on account of his sex – or their interpretation of his discordant expression of his sex.

Petitioner was prevented from moving onto trial because of his complaints of discrimination were characterized as based solely on his sexual orientation and not his sexual expression. In reality, there is an artificial line between discrimination based on one's sexual orientation and discrimination based upon the expression of one's socially stereotypical – and acceptable - gender role. That line or barrier is crossed with ease by an employer that discriminates against an employee when the perception of worth of that employee is gauged by the employee's conformity to socially acceptable sexual expression.

Petitioner was judged as less of a worthwhile employee because he did not fit respondent's acceptable stereotype for a male. Coincidentally, it follows that the stereotypic role mold is shattered equally when that employee belongs to a sexual minority. It is crucial that the Courts understand that the two are not mutually exclusive but frequently correlative. Therefore, it is important that employers, like respondent, understand that employees should be judged on their work and not their ability to fit a certain socially approved

gender mold which is most often expressed as sexual behavioral expectations through gender stereotypes.

II. The Decision Of The Court Of Appeals Is Erroneous

Title VII does not offer employees protection from workplace discrimination based upon an employee's sexual orientation. However, Title VII does not direct an employer to bestow extra protection on one sexual preference/orientation in absence of another. Petitioner, a homosexual male, suffered and endured daily abuse because his co-workers believed him to be less than masculine. Supervisors frequently engaged in similar conduct with employees in harassing Petitioner. Conduct was severe enough to cause Petitioner a nervous breakdown and other emotional trauma. Under Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998) a hostile environment exists in the workplace if it is determined to be both subjectively and objectively offensive, such that neither a reasonable person, nor the actual employee could perceive the workplace differently.

The Supreme Court in Oncale v. Sundowner Offshore Sers., Inc. 523 U.S 75, 118 S. Ct. 998 (1998) held that sexual harassment and the creation of a hostile work environment were not limited to situations between opposite sexes, thus embracing the reality of same-sex harassment. Title VII's requirement that applicable discrimination must have occurred

"because of sex" has been used by the Third Circuit to distinguish and dismiss Petitioner's claim as one due solely to sexual orientation and not same sex harassment or gender stereotyping.

To place an additional burden of production requirement that only homosexual litigants must address is a denial of due process. Heterosexual plaintiffs avoid the pre-trial sexual orientation disqualification in sexual harassment cases because heterosexuality is "accepted" as proper in the mainstream of society. The conduct that Petitioner complained of in his amended complaint was severe.

Petitioner argues that an objective and subjective analyses of his workplace environment, as required by Faragher, does not support the dismissal of this case, because Petitioner's complaints do not stem from discrimination based upon his sexual orientation. Petitioner's gender identity and sexual presentation, as a man, formed the basis of respondent's discriminatory conduct against Petitioner. The discriminatory conduct and animus of respondent, was not derived from respondent's perception of Petitioner's sexual orientation, but directed at Petitioner himself as a man – or less than masculine.

What respondent considered to be socially acceptable, created a lasting and indelible mark of prejudice based upon Petitioner due to sexual stereotyping. The use of a talismanic

rejection of Petitioner's claims, based on his sexual orientation, as homosexual, negates the possibility of a valid and objective determination as to the hostile work environment claim. In so doing, Courts inadvertently elevate homosexuality as the sole and primary evidentiary issue for examination on Title VII same sex hostile work environment appeals. In fact, Petitioner is unable to point to a case wherein a litigant's sexual orientation, as heterosexual, was used as a threshold basis for dismissal of a sexual harassment Title VII suit, without further review of conduct complained of based upon non-sexual preference issues.

Petitioner simply desires the opportunity to present his evidence of same sex harassment under the protection of Title VII. Both homosexuality and heterosexuality are sexual orientations; yet it is the homosexual litigant who caries an additional initial burden to "disprove" that their orientation was the basis for their pain in the workplace. Unfortunately, without specific admonition otherwise, once categorized as a homosexual litigant, the legitimacy of the litigant's hostile work environment claim under Title VII becomes irrelevant since a dismissal on orientation gives the fastest resolution of the case.

Certiorari jurisdiction is warranted to correct this error and clarify the law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Filed August 1, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-1261

JOHN BIBBY,
Appellant

v.

PHILA. COCA COLA BOTTLING COMPANY; RON WILSON, Individually, and in his Official Capacity as President of Operations; CLIFF RISELL, Individually, and in his Official Capacity as Vice President of Operations; FRAN SMITH, Individually, and in his Official Capacity as Production Manager Supervisor; BOB TAYLOR, Individually, and in his Official Capacity as Supervisor; STEVE FIORE, Individually, and in his Official Capacity as Quality Control Supervisor; FRANK BERTCHSCI, Individually, and in his Official Capacity as Employee at Coca-Cola, Bottling Company; JOHN KOLB, JR., Individually and in his Official Capacity as Director of Human Relations at Coca-Cola Bottling Company; J. BRUCE LLEWELLYN, Individually, and in his Official capacity as Chief Executive Officer at Coca-Cola Bottling Company; GENE KELLER, Individually, and in his Official Capacity as Warehouse Manager Supervisor

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ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Civil No. 98-cv-00287
District Judge: The Honorable Jan E. DuBois

Argued: April 26, 2001

Before: ROTH, BARRY, ALDISERT, *Circuit Judges*

(Opinion Filed: August 1, 2001)

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OPINION OF THE COURT

BARRY, *Circuit Judge*:

John J. Bibby claimed to have been subjected to same-sex sexual harassment at the hands of his employer, the Philadelphia Coca-Cola Bottling Company, in violation of Title VII. The District Court granted summary judgment to the employer, and Bibby appealed. Because we conclude that Bibby did not present sufficient evidence to demonstrate that he suffered discrimination "because of sex," we will affirm the judgment of the District Court.

BACKGROUND

John Bibby has been an employee of the Philadelphia Coca-Cola Bottling Company since June 1978. In 1993, Bibby, who is gay, experienced some medical difficulties, including weight loss, breathing problems, and vomiting blood.[1] On August 12, 1993, Bibby was having pains in his

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1. While Bibby claimed that he was perceived by his employer and his co-workers as having HIV/AIDS, he did not bring a claim for discrimination on the basis of perceived disability under the Americans with Disabilities Act. 42 U.S.C. § 12101 *et seq.*

stomach and chest when he was found by his supervisor with his eyes closed and a machine for which he was responsible malfunctioning with product being destroyed. He was accused of sleeping on the job. Bibby asked for permission to go to the hospital and was told by the supervisor to "just go." As he was leaving, the supervisor told him he was terminated, although in fact he was suspended with the intent to terminate. Bibby was hospitalized for several weeks for treatment of depression and anxiety. During his suspension and after receiving clearance from his treating physician, he met with his supervisors to arrange his return to work. At this meeting, he was told that he would be paid $5,000 and would be given benefits and unemployment benefits for six months if he resigned, but if he did not accept the offer, he would be terminated. Bibby refused the offer and was terminated but, following arbitration of a grievance he filed, he was reinstated and awarded back pay.

On December 23, 1993, the day he returned to work, Bibby was assaulted in a locker room by a co-worker, Frank Berthesi. Berthesi told Bibby to get out of the locker room, shook his fist in Bibby's face, grabbed Bibby by the shirt collar, and threw him up against the lockers. On January 22, 1995, Berthesi again came after Bibby.[2] On that day, Bibby was at the top of a set of steps working at a machine that puts cases of soda on wooden or plastic pallets. Berthesi was driving a forklift loaded with pallets, and he "slammed" the load of pallets under the stairs, blocking Bibby's exit from the platform on which he was standing. Bibby paged a supervisor, and Berthesi was ordered to remove the pallets. He refused. Berthesi and Bibby then exchanged some angry words, and Berthesi repeatedly yelled at Bibby that "everybody knows you're gay as a three dollar bill," "everybody knows you're a faggot," and "everybody knows you take it up the ass."[3] Later that

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2. In Bibby's brief to this Court, he claims that Berthesi "regularly engaged in harassment of a sexual nature with violent features against [Bibby]." The brief offers no citation to support this claim, and the record reveals only the December 1993 and January 1995 incidents.

3. We do not usually reproduce such gratuitously crude language in our opinions. Here, however, the essential dispute concerns whether the

day, Berthcsi called Bibby a "sissy." Bibby filed a complaint with the union and with the employer, and Berthcsi was suspended pending an investigation. Bibby refused the union's request that he withdraw the complaint, and Berthcsi's employment was terminated. The union filed a grievance on behalf of Berthcsi, and he was reinstated subject to the employer's condition that he undergo anger management training.

Bibby claims that supervisors also harassed him by yelling at him, ignoring his reports of problems with machinery, and arbitrarily enforcing rules against him in situations where infractions by other employees would be ignored. He does not assert that there was any sexual component to any of this alleged harassment. Finally, Bibby claims that graffiti of a sexual nature, some bearing his name, was written in the bathrooms and allowed to remain on the walls for much longer than some other graffiti. The record does not disclose the contents of any graffiti that allegedly mentioned Bibby's name.

Shortly after the January 1995 incident with Berthcsi, Bibby filed a complaint with the Philadelphia Human Rights Commission (PHRC) alleging that he was being discriminated against on the basis of his sexual orientation. In late 1997, after completing an investigation, the PHRC notified Bibby that it was closing the case and issuing him a 90-day right to sue letter.

On January 20, 1998, Bibby filed a pro se complaint in the Eastern District of Pennsylvania. He subsequently

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language and actions of Bibby's co-workers and supervisors constituted actionable sexual harassment, which requires "[c]onduct that is . . . severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive . . . ." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998), (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)). To indulge in delicacy in light of what the Court described as a "crucial" requirement would obscure the issue before this Court. *See Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) ("we think it is important both to acknowledge the appalling persecution [the plaintiff] allegedly endured and to identify the precise nature of the abuse so as to distinguish this case from future cases as they arise").

retained counsel, however, and an amended complaint was filed on June 30, 1998. The amended complaint named as defendants the employer and nine individual officers or employees of the employer. In the amended complaint, Bibby alleged that he had been sexually harassed in violation of Title VII, and sought compensatory and punitive damages. The complaint also included two supplemental state law claims, one for intentional infliction of emotional distress and one for assault and battery.

On November 20, 1998, the District Court granted in part defendants' motion to dismiss, dismissing all individual defendants and dismissing Bibby's assault and battery claim.[4] Following a period of discovery, the employer filed a motion for summary judgment on the remaining counts. On March 2, 2000, the District Court granted this motion. In its twenty-page memorandum and order, the Court determined that the evidence indicated that Bibby was harassed because of his sexual orientation and not because of his sex. Because Title VII provides no protection from discrimination on the basis of sexual orientation, summary judgment was granted on Bibby's Title VII claim. Having dismissed the only federal claim, the Court chose not to exercise supplemental jurisdiction over the remaining state law claim and dismissed that claim without prejudice.

It is from the grant of summary judgment to the employer that Bibby appeals. Our review is plenary. *See Pittston Co. Ultramar Am. Ltd. v. Allianz Ins. Co.*, 124 F.3d 508, 515 (3d Cir. 1997). We have jurisdiction under 28 U.S.C. § 1291.

This appeal presents a single issue: did Bibby present evidence sufficient to support a claim of same-sex sexual harassment under Title VII? The District Court found that Bibby was harassed because of his sexual orientation, not because of his sex, and therefore rejected his sexual harassment claim. Bibby argues that the District Court erred and further argues that its finding, if upheld, would place a special burden on gay and lesbian plaintiffs alleging same-sex sexual harassment because they will be required to prove that harassment was not motivated by their sexual orientation. We disagree on both scores.

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4. Bibby has not appealed the dismissal of these claims.

Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, provides that "[i]t shall be an unlawful employment practice . . . to discriminate against any individual . . . because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). It is clear, however, that Title VII does not prohibit discrimination based on sexual orientation. *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989). Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation. *See, e.g.*, Employment Nondiscrimination Act of 1996, S. 2056, 104th Cong. (1996); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994). Thus, Bibby can seek relief under Title VII only for discrimination because of sex.

Until 1998, it was unclear whether and under what circumstances Title VII would apply in a case of sexual harassment where both the harasser and the victim were of the same sex. The Fifth Circuit held that Title VII absolutely precluded a cause of action where both the harasser and victim were male. *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451-52 (5th Cir. 1994). The Fourth Circuit, however, found a cause of action for same-sex sexual harassment under Title VII but only if the harasser was homosexual. *Compare McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996) ("a claim does not lie where both the alleged harassers and the victim are heterosexuals of the same sex"), *with Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) ("a same-sex 'hostile work environment' sexual harassment claim may lie under Title VII where a homosexual male (or female) employer discriminates against an employee of the same sex"). Finally, the Seventh Circuit suggested that same-sex harassment was always actionable as long as the harassment was sexual in nature, regardless of the sex, sexual orientation, or motivation of the harasser and regardless of the sex of the victim. *Doe v. City of Belleville*, 119 F.3d 563, 576 (7th Cir. 1997) (proof of a desire to discriminate against one gender is not

necessary "when the harassment has explicit sexual overtones").

In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Supreme Court unanimously held that Title VII does provide a cause of action for same-sex sexual harassment. *Id.*, 523 U.S. at 79. In *Oncale*, the Court reviewed a Fifth Circuit decision which held that, as a matter of law, Title VII categorically barred any claim for same-sex sexual harassment. *Id.* at 77. The Court reversed. Title VII, it observed, protects men as well as women and just as there can be no absolute presumption that a person of one race would not discriminate against another person of the same race, there can be no absolute presumption that a person of one gender would not discriminate against another person of the same gender. *Id.* at 78. The Court reasoned that it is not the sex of the harasser or the victim that is important to a sexual harassment claim, but, rather, what is important is that the victim "prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discriminat[ion]* . . . because of . . . sex.'" *Id.* at 81 (emphasis, ellipses, and brackets in original).

The question of how to prove that same-sex harassment is because of sex is not an easy one to answer. As the Supreme Court noted in *Oncale*, when the harasser and victim are of the opposite sex, there is a reasonable inference that the harasser is acting because of the victim's sex. *Id.* at 80. Thus, when a heterosexual man makes implicit or explicit proposals of sexual activity to a woman co-worker or subordinate, it is easy to conclude or at least infer that the behavior is motivated by her sex. Similarly, if a man is aggressively rude to a woman, disparaging her or sabotaging her work, it is possible to infer that he is acting out of a general hostility to the presence of women in the workplace. These inferences are not always so clear when the harasser and victim are of the same sex.

There are several situations in which same-sex harassment can be seen as discrimination because of sex. The first is where there is evidence that the harasser sexually desires the victim. *Id.* at 80. Thus, when a gay or lesbian supervisor treats a same-sex subordinate in a way

that is sexually charged, it is reasonable to infer that the harasser acts as he or she does because of the victim's sex.

Same-sex harassment might also be found where there is no sexual attraction but where the harasser displays hostility to the presence of a particular sex in the workplace. *Id.* (stating that same-sex sexual harassment could be found "if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace"). For example, a woman chief executive officer of an airline might believe that women should not be pilots and might treat women pilots with hostility amounting to harassment. Similarly, a male doctor might believe that men should not be employed as nurses, leading him to make harassing statements to a male nurse with whom he works. In each of these hypothetical situations, it would be easy to conclude that the harassment was caused by a general hostility to the presence of one sex in the workplace or in a particular work function, and, therefore, amounted to discrimination because of sex.

Further, although it is less clear, a plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender. *Simonton*, 232 F.3d at 37-38 (discussing this theory but declining to rule on it because the plaintiff had not raised it before the District Court); *Higgins*, 194 F.3d at 259-60 (also declining to rule on this theory because it had been waived by the plaintiff); *City of Belleville*, 119 F.3d at 580-83 (holding that where co-workers verbally and physically harassed a young man because he wore an earring, repeatedly asked him whether he was a girl or a boy, and threatened to assault him sexually, he had presented sufficient evidence to support a conclusion that the harassment amounted to discrimination because of sex).[5]

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5. The judgment in *City of Belleville* was vacated and the case remanded by the Supreme Court "for further consideration in light of *Oncale*. . . ." 523 U.S. 1001. It would seem, however, that th[illegible] gender stereotypes

The gender stereotypes method for proving same-sex sexual harassment is based on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a case in which the Supreme Court reviewed the sex discrimination claim of a woman who had been denied partnership in an accounting firm at least in part on the basis that she was "macho," "overcompensated for being a woman," needed "a course in charm school," was "masculine," and was "a lady using foul language." *Id.* at 235. A partner advised the plaintiff that if she wished to improve her chances of earning partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* A plurality of the Court agreed that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250. The Court noted that "we are beyond

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holding of *City of Belleville* was not disturbed. In deciding the case, the Seventh Circuit relied on alternative holdings. The first was that where the harassment was sexual in nature, it was not necessary for the plaintiff to prove that it was motivated by the victim's gender. *City of Belleville*, 119 F.3d at 580. The second was that if proof of sex discrimination was necessary, the evidence that the victim's harassers sought to punish him for failing to live up to expected gender stereotypes would be sufficient to prove such discrimination. *Id.* at 580-83. The first holding was clearly wrong in light of *Oncale*'s requirement that all sexual harassment plaintiffs must prove that the harassment was discrimination because of sex. There is nothing in *Oncale*, however, that would call into question the second holding. As we discuss above, the gender stereotypes argument is squarely based on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Absent an explicit statement from the Supreme Court that it is turning its back on *Price Waterhouse*, there is no reason to believe that the remand in *City of Belleville* was intended to call its gender stereotypes holding into question. *City of Belleville* settled before there was a decision on remand, so it is not possible to know if the Seventh Circuit would have continued to apply the gender stereotypes holding. District courts in that Circuit, however, have continued to treat that holding as binding on them. *See, e.g., Jones v. Pacific Rail Services*, No. 00 C 5776, 2001 WL 127645, *2 (N.D. Ill. February 14, 2001); *Spearman v. Ford Motor Co.*, No. 98 C 0452, 1999 WL 754568, *6 (N.D. Ill. September 9, 1999); *EEOC v. Trugreen Limited Partnership*, 122 F.Supp.2d 986, 989-90 (W.D.Wis. 1999).

the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' " *Id.* at 251 (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (some internal quotation marks omitted). Neither of the two concurring opinions in *Price Waterhouse* disagreed.

Relying on *Price Waterhouse*, and as we noted above, the Seventh Circuit held that where evidence indicated that the harassment of a sixteen-year old young man was motivated by his co-workers' belief that because he wore an earring he was not sufficiently masculine, there was sufficient evidence to support a finding that the harassment amounted to discrimination because of sex. *City of Belleville*, 119 F.3d at 581 ("a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex").

Thus, there are at least three ways by which a plaintiff alleging same-sex sexual harassment might demonstrate that the harassment amounted to discrimination because of sex — the harasser was motivated by sexual desire, the harasser was expressing a general hostility to the presence of one sex in the workplace, or the harasser was acting to punish the victim's noncompliance with gender stereotypes. Based on the facts of a particular case and the creativity of the parties, other ways in which to prove that harassment occurred because of sex may be available. *See Oncale*, 523 U.S. at 80-81 (noting that "[a] same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace"); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999) ("we discern nothing in the Supreme Court's [*Oncale*] decision indicating that the examples it provided were meant to be exhaustive rather than instructive").

That having been said, however, it is clear that "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]* . . . because of . . . sex.'" *Oncale* at 81 (emphasis, ellipses, and brackets in original). Bibby simply failed in this respect; indeed, he did not even argue that he was being harassed because he was a man and offered nothing that would support such a conclusion. There was no allegation that his alleged harassers were motivated by sexual desire, or that they possessed any hostility to the presence of men in the workplace or in Bibby's particular job. Moreover, he did not claim that he was harassed because he failed to comply with societal stereotypes of how men ought to appear or behave or that as a man he was treated differently than female co-workers. His claim was, pure and simple, that he was discriminated against because of his sexual orientation. No reasonable finder of fact could reach the conclusion that he was discriminated against because he was a man.[6]

As noted earlier, Bibby argues that in reaching this conclusion, we will be placing an extra burden on gay and lesbian plaintiffs bringing an action for same-sex sexual harassment by requiring that such plaintiffs prove that their harassers were not motivated by anti-gay animus. Bibby is wrong. Whatever the sexual orientation of a plaintiff bringing a same-sex sexual harassment claim, that plaintiff is required to demonstrate that the harassment was directed at him or her because of his or her sex. Once such a showing has been made, the sexual orientation of the plaintiff is irrelevant. In addition, once it has been shown that the harassment was motivated by the victim's sex, it is no defense that the harassment may have also

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6. Given this conclusion, we need not reach the additional requirement that the alleged conduct was "severe or pervasive enough to create an objectively hostile or abusive work environment . . . ." *Oncale*, 523 U.S. at 81 (internal quotation marks omitted). We note, however, that the only specifics Bibby has alleged are one physical assault (with no sexual component) and one incident of serious name calling (with a sexual component).

been partially motivated by anti-gay or anti-lesbian animus. For example, had the plaintiff in *Price Waterhouse* been a lesbian, that fact would have provided the employer with no excuse for its decision to discriminate against her because she failed to conform to traditional feminine stereotypes.

Harassment on the basis of sexual orientation has no place in our society. *See Simonton*, 232 F.3d at 35 (harassment on the basis of sexual orientation "is morally reprehensible whenever and in whatever context it occurs, particularly in the modern workplace"); *Higgins*, 194 F.3d at 259 (harassment because of sexual orientation "is a noxious practice, deserving of censure and opprobrium"). *See also Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206, 1209 (9th Cir. 2001) (quoting *Higgins*). Congress has not yet seen fit, however, to provide protection against such harassment. Because the evidence produced by Bibby — and, indeed, his very claim — indicated only that he was being harassed on the basis of his sexual orientation, rather than because of his sex, the District Court properly determined that there was no cause of action under Title VII.

CONCLUSION

For the foregoing reasons, we will affirm the judgment of the District Court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN J. BIBBY, Plaintiff	:	
	:	CIVIL ACTION
v.	:	
THE PHILADELPHIA COCA COLA BOTTLING CO. Defendant.	:	NO.98-287

ORDER & MEMORANDUM

ORDER

AND NOW, to wit, this 2nd day of March, 2000, upon consideration of Defendant Philadelphia Coca-Cola Bottling Company's Motion for Summary Judgment (Document No.46, filed June 24, 1999), the Memorandum of Law on Behalf of Plaintiff, John. J. Bibby, Contra the Motion for Summary Judgment Filed on Behalf of the Defendant, Philadelphia Coca-Cola Bottling Company (Document No.47, filed July 19,1999), Defendant's Reply Memorandum to Plaintiffs Memorandum in Opposition to Defendant's Motion for Summary Judgment (Document No.49, filed August 16,1999), Defendant's Motion for Leave to Supplement Defendant's Motion for Summary Judgment (Document No.70, filed January 5,2000), and Plaintiffs Reply to Supplemental Filing for Summary Judgment by Defendant, Philadelphia Coca Cola Bottling Company

(Document No.71, filed January 19,2000), for the reasons stated

in the attached memorandum, **IT IS ORDERED** as follows:

1. Defendant's Motion for Summary Judgment is **GRANTED** as to Count I of the Amended Complaint alleging a violation of Title VII, 42 U.S.C. § 2000e et seg., and **JUDGMENT** is **ENTERED** in favor of Defendant Philadelphia Coca-Cola Bottling Company and against Plaintiff John J. Bibby; and,

2. Pursuant to 28 U.S.C. § 1367(c)(3), the Court declines to exercise supplemental jurisdiction over Count II of the Amended Complaint alleging a state law claim of intentional infliction of emotional distress, and Count II of the Amended Complaint is **DISMISSED WITHOUT PREJUDICE**.

MEMORANDUM

Presently before the Court is the motion for summary judgment of Philadelphia Coca-Cola Bottling Company ("Coca-Cola" or "defendant"). In its motion, defendant seeks summary judgment against plaintiff on plaintiff's Title VII same-sex sexual harassment claim (Count I, Amended Complaint) and plaintiff's state law intentional infliction of emotional distress claim (Count II, Amended Complaint).

I. BACKGROUND

Based on the evidence currently before the Court, the facts can be summarized as follows:

Plaintiff John Bibby ("plaintiff") began working for defendant in June, 1978, shortly after

graduating from high school. Approximately 30 days after beginning his employment with Coca-Cola, plaintiff joined the International Brotherhood of Teamsters, Local 830 ("Local 830"), a union which has a collective bargaining relationship with Coca-Cola. At all
times material to the case, the tenure of plaintiffs employment were governed by a collective bargaining agreement ("CBA") between Coca-Cola and Local 830.

The first incident of which plaintiff complains in the Amended Complaint occurred in 1993, when plaintiff became ill. He experienced weight loss and vomited blood. During this time, plaintiff claims he "felt compelled to disclose his alternative male lifestyle to defendant, Coca Cola." On August 12, 1993, plaintiff experienced chest and stomach pains so severe as to cause him to double over in pain. That same day, Cliff Risell, defendant's Vice- President of Operations, approached plaintiffs workstation from behind, and found plaintiff slumped over, apparently asleep. Risell yelled to plaintiff, at which point plaintiff jumped to his feet, and stated that he had severe chest pains. Plaintiff told Risell that he needed to go to the hospital. Risell allegedly told him, "So go." However, before plaintiff could leave the plant, Risell, accompanied by Dennis Anderson, a Local 830 shop steward, stopped him and told him he was suspended with intent to terminate for sleeping on the job and for leaving his assigned post.

During plaintiffs suspension, he claims to have been offered $5,000 with six months' benefits and six months' unemployment by Risell and John Kolb--defendant's director of human resources-if plaintiff would quit. Plaintiff alleges that he was told that, if he did not accept this offer, he would be terminated. Plaintiff decided to fight his

suspension, at which point he was terminated. On December 17, 1993, after an arbitration hearing was held pursuant to the CBA, an arbitration panel ruled against defendant, finding that Risell had attempted an improper discharge of plaintiff (the "arbitration decision"). Plaintiff was reinstated with full back pay and all benefits.

Plaintiff alleges that, after being reinstated, he experienced tension with Risell and other co-workers. As evidence of this tension, plaintiff points to an event which occurred on December 23, 1993, less than a week after he was reinstated. On that date, plaintiff, a co-worker, Frank Bertchsci, and Risell were together in the employee locker room. Bertchsci got up, came over to plaintiff, made a fist, and told plaintiff to leave. Plaintiff claims that Bertchsci grabbed him, threw him against the lockers, and screamed that he would beat plaintiff badly. According to plaintiff, all of this occurred in Risell's presence, and with Risell's tacit approval. Plaintiff reported this incident to company officials, but no action was taken.

More than a year later, on January 22, 1995, plaintiff alleges that Bertchsci again threatened to physically harm plaintiff. Bertchsci, while controlling a forklift, blocked plaintiffs movement by dropping his cargo on the steps where plaintiff was working. Bertchsci told plaintiff that Bertchsci would "kick [plaintiffs] ass." Bob Taylor, a supervisor, was present for this incident, and told plaintiff and Bertchsci that if they did not stop, Taylor would fire them both. Bertchsci did not stop, though, yelling to plaintiff, "Everyone knows you're a faggot," three times, followed by, "Everyone knows you are as gay as a three dollar bill," and, "Everyone knows you take it up the ass," three times each. Later that day, Bertchsci called

plaintiff a "sissy" (the "January 22 statements"). Plaintiff reported the January 22 statements to Fran Smith, defendant's production manager supervisor. However, plaintiff claims that no action was taken.

Plaintiff also avers that he suffered a number of adverse employment actions in the wake of his winning the arbitration hearing and the January 22 statements. On January 27, 1995, Risell scheduled plaintiff for a transfer to an undesirable night shift. When plaintiff complained to Risell about this change in schedule, Risell allegedly told plaintiff that he had the "power to drop the charges and end this."

Plaintiff claims that Risell singled him out for enforcement of the rules. For instance, plaintiff states that Risell wrote him up for wearing an out-of-date version of the offici2 unifonl1, an action which, according to plaintiff, Risell did not take with any other employee. Plaintiff contends that other employees often were, in a variety of ways, out of unifonl1, yet Risell did not discipline these other employees. However, according to plaintiff, Risell wrote plaintiff up for minor infractions of the dress code, such as having two buttons on his shirt unbuttoned. Plaintiff also alleges that Risell disciplined him for not wearing proper safety glasses, when other employees were not disciplined for the same infraction. Finally, plaintiff says that Risell would stand and watch plaintiff work, but would not do the same for other employees.

Plaintiff asserts that this unfair treatment that he suffered came not only from Risell, but also from other supervisors. He reports that on one occasion, Gene Keller, defendant's director of warehousing, stood by his workplace and yelled at him as he worked. As a result of this episode, plaintiff went to the hospital, complaining that he was suffering a nervous breakdown.

Plaintiff also claims that he was always watched more closely than other employees. For example, plaintiff states that if he arrived at work even two minutes late, his salary was docked, and that other employees were not subjected to the same scrutiny. Plaintiff also states that, although he was written up by a supervisor for having a newspaper on the factor floor other employees were not written up for having reading material on the factory floor.

In April, 1996, plaintiff had an accident with a forklift. Plaintiff alleges that, because Risell expedited proceedings before the safety board, the safety board heard the case in one week, whereas, according to plaintiff, it ordinarily required months. Risell asked the safety board to fire plaintiff, because he had two accidents charged against him, and company policy permitted dismissal in such cases. The safety board did not do so, and instead, charged plaintiff with a preventable accident causing $5,000 damage, which added five points to his record.[1] Plaintiff filed a grievance regarding this determination, but is unsure of the outcome. He claims the handling of the forklift case was contrary to defendant's practice not to report such actions.

In November, 1997, plaintiff complained both to defendant and to Local 830 that a coworker with low seniority had been promoted to acting foreman without posting a position, a violation of the CBA. Upon review, Loca1830 agreed, and informed defendant that plaintiff was entitled to the position. However, when faced with that determination, Risell eliminated the acting foreman position. One week later, Risell reinstated the employee in an acting foreman position, and

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[1] Risell testified that workplace accidents were tracked based on whether they were preventable, and how much damage occurred. Employees were then charged with points based on these factors, and, if they accumulated enough points, they were fired.

plaintiff again complained. Ultimately, the position was reassigned to another department.

Plaintiff also alleges that various graffiti containing sexual slurs was drawn in the bathroom, singling him out for his sexual preference. He claims that while other graffiti was routinely removed from the bathroom at work, the graffiti targeting plaintiff was not removed. Plaintiff states that this occurred despite the fact that he complained to Larry Norvell, the Vice

President of Human resources. Finally, plaintiff contends that various members of management would follow him around at work, regardless of whether he was going from one job to another, or just to the bathroom.

As a result of the harassment he faced at work, plaintiff says he suffered from, and continues to suffer from, depression, stomach, and intestinal disorders. He went to see a psychologist, Edward Dougherty, for the depression. After interviewing plaintiff, Dr. Dougherty found that plaintiff was suffering from post traumatic stress disorder related to his experience at Coca Cola. Dr. Dougherty prescribed continuing psychological and/or psychiatric care for plaintiff, including individual therapy sessions twice a week.

II. PROCEDURAL HISTORY

Plaintiff filed a pro se Complaint on January 21,1998. This Complaint alleged violations of Title VII of the Civil Rights Act of 1965,42 U.S.C.A. §§ 2000e-2000e-17 ("Title VII") and the Pennsylvania Crimes Code. Plaintiff, through counsel, filed an Amended Complaint on June 30, 1998, alleging, inter alia, violations of Title VII and a state law claim for intentional infliction of emotional distress. The Amended Complaint named not only defendant, but also a number of defendant's

individual employees. On July 22, 1998, defendant filed a Motion to Dismiss All Claims in the Amended Complaint. In an Order dated November 19, 1998, this Court granted defendant's motion with respect to all of the individual defendants named in plaintiffs claims, and denied the motion with respect to defendant.

On June 24, 1999, defendant filed a Motion for Summary Judgment. On July 19, 1999, plaintiff filed a Memorandum of Law Contra the Motion for Summary Judgment. On August 16, 1999, defendant filed a Reply Memorandum to the Plaintiffs Motion of Opposition. On January 5, 2000, defendant filed a Motion for Leave to Supplement Defendant's Motion for Summary Judgment. On January 19,2000, plaintiff filed a Reply to Supplemental Filing for Summary Judgment by the Defendant, Philadelphia Coca Cola Bottling Company. In an Order dated January 31,2000, this Court granted defendant's motion for leave to supplement the motion for summary judgment.

III. STANDARD OF REVIEW

"If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law [,]" summary judgment shall be granted. Fed. R. Civ. P. 56(c); ~ Celotex Corp. v. Catrett, 477 U.S. 317,322-24 (1986). The Supreme Court has explained that Rule 56(c) requires "the threshold inquiry of determining whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."

Anderson v. Liberty Lobby. Inc.; 477 U.S. 242,250 (1986). Therefore, "a motion for summary judgment must be granted unless the party opposing the motion can adduce evidence which, when considered in light of that party's burden of proof at trial, could be the basis for a jury finding in that party's favor." J.E. Mamiye & Sons. Inc. v. Fidelity Bank, 813 F.2d 610,618 (3d Cir. 1987) (citing Anderson and Celotex Corp.).

In considering a motion for summary judgment, the evidence must be considered in the light most favorable to the non-moving party. Adickes v. S.H. Kress and Co., 398 U.S. 144, 159 (1970) (quoting United States v. Diebold, 369 U.S. 654,655 (1962). However, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. .Indus. Co. v. Zenith Radio Cam., 475 U.S. 574,586 (1986). Therefore, "[i]f the evidence [offered by the non-moving party] is merely colorable or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted). On the other hand, if reasonable minds can differ as to the import of the proffered evidence that speaks to an issue of material fact, summary judgment should not be granted.

IV. DISCUSSION

A. Count I -Plaintiff's Title VII claim

Plaintiff brings his sexual discrimination action under Title VII of the Civil Rights Act of 1964. 42 U.S.C.A. § 2000e et seg. (West Supp. 1999). Defendant argues that plaintiffs Title VII claim is appropriate one summary judgment, because plaintiff has not made out a prima facie case of discrimination. Specifically, defendant

argues that plaintiff has not shown that he suffered discrimination on the basis of a protected characteristic. Although plaintiff claims he was discriminated against because of sex, defendant argues that any discrimination suffered by plaintiff was discrimination based on sexual orientation, a non- protected class under Title VII. The Court concludes that any discrimination that plaintiff suffered was based on his sexual orientation, not his sex, and, therefore, defendant' s motion for summary judgment must be granted as to Count I of the Amended Complaint.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) the Supreme Court announced a basic framework for courts to follow in considering summary judgment motions under Title VII. "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of ...discrimination." Although the complaint in McDonnell Douglas dealt with a claim based on failure to hire, the Court noted that the "facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.", 411 U.S. at 802, n. 13. When presented with a subsequent Title VII claim McDonnell Douglas, the Supreme Court stated that the

> central focus of the inquiry in a case such as this is always whether the employer is treating some people less favorably than others because of their race, color, religion, sex, or national origin. ...A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise

> unexplained, are more likely than not based on the consideration of impermissible factors. Furnco Construction Corp. v. Waters, 438 U.S. 567,577 (1977).

In this case, plaintiff claims defendant created a hostile work environment on the basis of sex. "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." Oncale v. Sundowner Offshore Services, 118 S.Ct. 998,1001 (1998). In order to demonstrate employer liability for a hostile environment based on sex created by a co-worker, plaintiff must demonstrate that: (1) the employee belongs to a protected class; (2) the employee was subject to harassment, that is, unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment, becoming so severe and pervasive as to create a hostile work environment; and, (5) the employer knew or should have known of the charged sexual harassment and failed unreasonably to take appropriate corrective action. Fenton v. HiSan, 174 F.3d 827,829-30 (6th Cir. 1999); Henson v. City of Dundee, 682 F.2d 897,903 (11th Cir. 1982); Hall v. Gus Constr. Co., 842 F.2d 1010,1013 (8th Cir. 1988); Swentek v. US Air, 830 F.2d 552,557 (4th Cir. 1987). Here, the plaintiff fails this test, because he cannot show that the harassment complained of was based on sex, as is required under Title VII.

In Oncale, the Supreme Court had the opportunity to elaborate on the types of Title VII

claims that can be "based on sex." In Oncale, a male employee on an oil-drilling platform was subjected to sex-related taunts, forcible sexual actions against him, and physical assaults of a sexual nature, all by male co-workers. The Fifth Circuit held that the plaintiff in Oncale had not alleged harassment based on sex, because Title VII did not recognize harassment by one male against another male. Oncale v. Sundowner Offshore Services, 83 F .3d 119 (5th Cir. 1996). The Supreme Court reversed the Fifth Circuit, holding, "Title VII prohibits discrimination] ...because of sex in the terms or conditions of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements." Oncale, 118 S.Ct. at 1002. The Court also stated that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on t basis of sex." Id at 1002.

However, the Court cautioned against extending the reach of Title VII too far, stating that "Title VII does not prohibit all verbal or physical harassment in the workplace; it directed only at discriminat[ion] ...because of ...sex." ~ The Court added that no matter w the plaintiffs theory, "he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discriminat[ion] because of sex." ~ It is against this backdrop that this Court must determine whether the plaintiff, provided evidence that he has been harassed on the basis of sex.

One issue that the Court in Oncale did not address is whether discrimination on the basis of sexual orientation could constitute discrimination on the basis of sex for the purposes of Title VII. However, lower courts that have addressed this issue have consistently held that discrimination on

the basis of sexual orientation is not discrimination on the basis of sex under Title VII. Typically, the question of whether a plaintiff could allege a claim for discrimination based on sex turns on a court's interpretation of the word "sex" in Title VII. "'It is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary common meaning.'" ~ Dillon v. Frank, No.90-2290, 1992 WL 5436, at *4, (6th Cir. January 15,1992) (quoting Ulane v. Eastern Airlines, 742 F.2d 1081,1085 (7th Cir. 1985).

In order to determine the ordinary and common meaning of the word "sex," the Court turns to a dictionary definition. See, e.g., Sutton v. United Air Lines, 119 S.Ct. 2139,2150 (1999). The New Shorter Oxford English Dictionary lists multiple definitions for "sex," including:

> A. n. 1. Either of the two main divisions (male and female) into which many organisms are placed on the basis of their reproductive functions or capacitie...
>
> 4. The difference between male and female, esp. in humans
>
> B. adj. Of or pertaining to sex or sexual activity; arising from a difference or consciousness of sex.
> 2 New Shorter Oxford English Dictionary , 2801 (Lesley Brown, ed., Thumb Index ed. 1993).

The dictionary notes that the third definition above is essentially synonymous with the word "sexual." See id.

Applying the aforementioned principle of statutory interpretation, the Court ho that Congress intended the word "sex" in Title VII to refer to the first two definitions noted above—

distinguishing between male and female--rather than the third--referring to sexual activity. As the Sixth Circuit noted in .Dillon, one can find this intent in "the context in which [the word "sex"] was placed [in the statute], along with either immutable characteristics (race, color, national origin) and a characteristic so deeply rooted for most that it is almost immutable (religion)." Dillon, supra., at *4. Similarly, the Second Circuit has noted that "the other categories afforded protection under Title VII refer to a person's status as a member of a particular race, color, religion or nationality. 'Sex,' when read in this context, logically could only refer to membership in a class delineated by gender, rather than sexual activity regardless gender." DeCintio v. Westchester County Medical Center, 807 F.2d 304,306 (2d Cir. 1986). seems clear from the context of the statute that Congress intended the word "sex" in Title VII refer to biological distinctions rather than to sexual activity or consciousness of sex.

Two cases in this Court, and one in the District of New Jersey, all decided before Oncale, have discussed the distinction between discrimination on the basis of sexual orientation and discrimination on the basis of sex. In Swage v. The Inn Philadelphia and Creative Remodeling, Judge Shapiro of this Court noted that the "appeals courts [which] have consider whether Title VII prohibits conduct based on an employee's sexual orientation agree that it dc not." No. Civ. A. 96-2380, 1996 WL 368316, at *3 (E.D.Pa. June 21, 1996). In Hicks v. Arthur Judge Joyner of this Court held that a complaint was flawed where it included "a claim of discriminatipn based on sexual orientation under Title VII although [sexual orientation] is not protected class [under Title VII]." 891 F. Supp. 213,215 (E.D.Pa. 1995). Finally, most recently, in the District of New Jersey, a court

noted that sexual harassment based on sexual orientation "it is clear, would not be actionable under Title VII." Caldwell v. KFC Corp., 958 F. Supp. 962, 967, n.2(D.N.J.1997).

Since Oncale, a number of other courts around the country have had the opportunity to consider whether Oncale affected the analysis of sexual orientation as a protected class. Those courts to consider the issue have consistently held that sexual orientation is not a protected class, even in the wake of Oncale. See. e.g.. Klein v. McGowan, 36 F. Supp.2d 885, 889 (D.Minn. 1999) ("However, it is well settled that Title VII does not recognize a cause of action for discrimination based on the victim's sex to be actionable."); Metzger v. Compass Group U.S.A., No. Civ. A. 98-2386-GTV, 1999 WL 714416, at *2 (D.Kan. September 1,1999) ("Harassment based solely on a person's sexual preference or orientation is not protected by Title VII."); Higgins v. New Balance Athletic Shoe, 21 F. Supp.2d 66,73 (D.Me. 1998) (Title VII does not recognize "a cause of action for any type of discrimination based on sexual orientation.").

In Salvatore v. KLM Royal Dutch Airlines, No.98 Civ. 2450(LAP), 1999 WL 796172 (S.D.N.Y. September 30,1999) ("KLM"), the court held that the Supreme Court's holding in Oncale had done nothing to overturn those cases upholding a distinction, for the purposes of Title VII, between discrimination based on sex and discrimination based on sexual orientation. at * 12. KLM dealt with a number of Title VII claims, including one on the basis of sexual orientation discrimination. The court held that "harassment based on a plaintiffs sexual orientation, as opposed to a plaintiffs sex, is not covered by Title VII." ~ In reaching this conclusion, the KLM court relied on the fact that the Oncale Court confined its analysis to the

language of Title VII requiring the discrimination to be based on sex, and "left undisturbed that line of cases finding that discrimination based on sexual orientation is not discrimination based on sex and thus does not state a claim under Title VII." Similarly, in Higgins, a plaintiff argued that the discrimination that he suffered based on his sexual orientation constituted discrimination on the basis of sex. The court in Higgins considered Title VII's coverage of discrimination on the basis of sex, as it has been defined by other courts, on the one hand, and discrimination on the basis of "gender"--a concept in which "because of sex" would encompass "personality features and socio-sexual roles typically associated with 'masculinity' or 'femininity,"' on the other, and rejected the gender approach. Higgins, 21 F. Supp.2d at 75. In holding that Title VII required an interpretation of the word "sex" in a more traditional manner, the Higgins court stated, "In its current form, Title VII does not provide a remedy to persons who have experienced harassment motivated solely by animus toward the plaintiffs sexual orientation."

This Court agrees with the above cases and holds that although the Supreme Court's decision in Oncale has made clear that same sex discrimination is actionable under Title VII, the decision has not expanded the reach of Title VII to include discrimination on the basis o sexual orientation. The Court now turns to the remaining question--whether the behavior described by plaintiff in this case constitutes discrimination on the basis of sex or discrimination on the basis of sexual orientation.

In Carreno v. Local Union No.226. International Brotherhood of Electrical Worker No- Civ- A- No- 89-4083-S. 1990 WL 159199 (D.Kan. September

27,1990), a district court was presented with a case of insults to an open homosexual similar to those in this case.[2]

The court in Carreno concluded that these insults were based on sexual orientation--the fact that plaintiff was a homosexual--rather than sex--the fact that plaintiff was a male. See id. at *3. Such comments, the court ruled, were not within the ambit of Title VII.

Like the court in Carreno, this Court concludes that plaintiffs claim of sexual harassment under Title VII is based upon sexual orientation discrimination. In Oncale, the Court stated that the critical issue in evaluating whether harassment has occurred on the basis of sex is "'whether members of one sex are exposed to conditions of employment to which members of the other sex are not exposed. ", 118 S.Ct. at 1002. In this case, plaintiff points to only three statements of a sexual nature, the January 22 comments, and the graffiti. The January 22 comments, all involved a co-worker telling the plaintiff, an open homosexual, "everyone know~ you're a faggot;" "everyone knows you are as gay as a three dollar bill;" and, finally, "everyone knows you take it up the ass." Certainly, these comments are not pleasant, and are inappropriate Nonetheless, they are not actionable under Title VII, because they all are clearly targeted at the plaintiffs sexual orientation, and not at his sex.

Similarly, the graffiti in the bathroom of which plaintiff complains said, "Some faggot [sic] keeps pulling this away from the wall to see some dick," followed by, "Yeah, yours on the wall. Again, the language and context are unpleasant, but the graffiti is clearly aimed at sexual orientation, rather than at plaintiffs sex. Because none of these statements indicate that plaintiff is exposed to

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[2] In Carreno, the court found that the plaintiff had been subjected to "derogatory comments such as 'Mary' and 'faggot.'" Carreno, supra., at *1.

conditions of employment different from members of the opposite sex, as the Oncale Court requires, this Court grants defendant's motion for summary judgment as to Count I of the Amended Complaint.

B. Count II -Plaintiffs intentional infliction of emotional distress claim

In Count II of his Amended Complaint, plaintiff asserts a state law intentional infliction of emotional distress claim against defendant. Plaintiff alleges that Coca-Cola' s conduct is sufficiently outrageous to justify such a claim. Defendant argues that such a claim is appropriate for summary judgment because the claim is preempted by federal labor law, specifically §§ 7-8 of the National Labor Relations Act ("NLRA")[3] and § 301 of the Taft-Hartle Act. Defendant also argues that the claim is time-barred under the applicable statute of limitations, and that the conduct in question does not rise to the level of outrageousness require(by Pennsylvania law.

Plaintiff responds that his claim is not preempted by federal labor law, because Title VII is

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[3] §7 of the NLRA, 28 U.S.C.A. § 157 (West Supp. 1999), provides that:

Employees shall have the right to self-organization, to form, join or assist labor organizations, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...."

§8 of the NLRA, 28 U.S.C.A. §158 (West Supp. 1999) provides, in relevant part:

(a) It shall be an unfair labor practice for an employer—
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;...
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization....

not preempted by federal labor law.[4] Plaintiff also argues that the claim is not time-barred, because plaintiff has alleged some incidents that occurred within the two-year statute of limitations, and that, under the continuing violation exception to the statute of limitations, all defendant's conduct is relevant. Finally, plaintiff argues that defendant's conduct does rise to level of outrageousness required by Pennsylvania law.

Defendant has presented evidence that all of plaintiffs claims are based on retaliation for conduct protected under the NLRA and are therefore preempted. Plaintiff argues that some of his claims are based on retaliation and that others are based on sexual discrimination (or, as the Court has found, discrimination related to sexual orientation). Because the Court declines to exercise supplemental jurisdiction over the Count II of the Amended Complaint, pursuant to 28 U.S.C. § 1367(c)(3), it need not decide this issue. The Court will, however, comment on the preemption defense.

In San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), the Supreme Court considered a claim that the NLRA preempted a California law. The Court he that, in passing the NLRA, Congress intended to "confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order." The specific and specially constituted tribunal to which the Garmon Court was referring is the National Labor Relations Board ("NLRB").

Retaliation for the exercise of a protected right under the NLRA is within the exclusive jurisdiction of the NLRB. See New Orleans Cold

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[4] Plaintiff makes no argument as to whether federal labor law preempts a state intentional infliction of emotional distress claim, however.

Storage & Warehouse, 326 N.L. No.161. To prevail on a retaliation claim, plaintiff must prove that the exercise of a protected right was a substantial or motivating factor in defendant's alleged retaliatory conduct. Mt. Healthy City School Dist. Bd. Of Educ. V. Doyle, 429 U.S. 274,287 (1977). Although Mt. Healthy dealt with a constitutional claim of retaliation, it has been applied to claims under the NLRA as well. See Webster v. Dept. of the Army, 911 F.2d 679, 696 (Fed. Cir. 1990) (citing National Labor Relations Bd. V. Transportation Management corp., 462 U.S. 393 (1983).

In his Amended Complaint, plaintiff alleges that a coworker made a harassment charge against plaintiff "solely to punish Plaintiff for attempting to enforce seniority and job posting rules." Amended Complaint, ¶133. During his deposition, plaintiff repeatedly stated the disparate disciplinary treatment that he faced resulted from his asserting his rights under CBA. However, plaintiff does not mention a claim for retaliation in his Amended Complain and it is unclear exactly which of defendant's actions plaintiff perceives to have been in retaliation for exercising his rights under the CBA, and which actions he perceives to have b aimed at his sexual orientation. The Court also notes that there is a paucity of evidence on the claimed link between the harassment and the exercise of a protected right.

Under 28 U.S.C. § 1367 ("§ 1367"), a district court may decline to exercise it supplemental jurisdiction over state law claims if "the district court has dismissed all claims which it has original jurisdiction " 28 U.S.C.A. § 1367(c)(3) (West Supp. 1999). In interpreting this provision, the Third Circuit has held that "where the claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendant state claims unless

considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so." Borough of West Mifflim v. Lancaster, 45 F .3d 780, 788 (3d Cir. 1995). The Court concludes that no affirmative justification to retain jurisdiction OVI state law claim is present in this case. Because the Court is granting summary judgment as to the only federal claim, the Court declines to exercise supplemental jurisdiction over plaintiffs state law claim of intentional infliction of emotional distress.

V. CONCLUSION

The Court concludes that plaintiffs Title VII claim is premised on sexual orientation discrimination. Because sexual orientation is not a protected class under Title VII, the Court grants defendant's Motion for Summary Judgment as to Count I, and enters judgment in favor of defendant and against plaintiff on Count I of the Amended Complaint. The Court declines to exercise supplemental jurisdiction over plaintiffs state law claim for intentional infliction of emotional distress, and therefore dismisses that claim without prejudice.

BY THE COURT

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JAN E. DUBOIS, J.